Supreme Court, U.S.
FILED
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No. ——

IN THE
Supreme Court of the United States

TRANSAMERICA ASSURANCE COMPANY, *et al.*,
Petitioners,

v.

EARL TILLERY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant has the right to amend a notice of removal under 28 U.S.C. § 1653 to include additional facts supporting a claim of federal question jurisdiction, where those facts existed at the time of removal.

LIST OF PARTIES

The following were parties to the proceeding in the court of appeals and in the district court:

1. Plaintiffs, Earl Tillery and 469 others, individually and on behalf of all others similarly situated.*

2. Defendants:

Transamerica Assurance Company. The following are the parent companies of Transamerica Assurance Company: Transamerica Life Insurance and Annuity Company, Transamerica Occidental Life Insurance Company; Transamerica Insurance Corporation of California; Transamerica Corporation, Aegon N.V. Transamerica Assurance Company has no non-wholly owned subsidiaries.

Future Planning Associates, Inc.: No parent company or non-wholly owned subsidiaries.

*** The complete list of the 469 other individuals is included as Exhibit A to the Plaintiff's Petition (App. D).**

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this action on October 20, 1999.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Oklahoma dated August 20, 1999 (App. A, *infra*) is unreported.

The Opinion of the United States Court of Appeals for the Tenth Circuit, Case Nos. 99-5180, 99-5185, 99-5188, 99-5191 (App. B, *infra*) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 20, 1999. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441(a) provides in relevant part as follows:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurdisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where the action is pending.

28 U.S.C. § 1446 provides in relevant part as follows:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt of the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading

has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1653 provides as follows:

Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Rule 8(a) of the Federal Rules of Civil Procedure provides in relevant part as follows:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

STATEMENT

A. Summary.

This Petition involves critical issues regarding the evidence a district court must consider in ruling on a motion to remand and the pleading requirements for a

Notice of Removal. While the overwhelming authority—including a decision of this Court—requires mere notice pleading in connection with a Notice of Removal and requires courts to consider evidence and other materials submitted to the court subsequent to the Notice of Removal, the district court below believed it had no such authority. As a result, the court limited its review to the Notice of Removal, applied a heightened pleading standard requiring Petitioners to distinguish in the Notice of Removal *hypothetically* applicable authority, and refused to permit amendment of the Notice of Removal to include facts that existed at the time of removal. The Tenth Circuit's affirmation of that decision meant that the voluminous briefs, evidence, and exhibits Defendants had submitted in opposition to Plaintiffs' Motion to Remand were never considered by the district court.

B. The filing of the case below and removal to federal court.

Plaintiffs filed their Petition[1] in Oklahoma state court on March 19, 1999. The Petition alleged generally that Defendants had misled Plaintiffs, all of whom were members of a union, regarding certain aspects of a term life insurance plan. (App. D, *infra*, pp. 16a-18a). Petitioners/Defendants Transamerica Assurance Company ("TAC") and Future Planning Associates, Inc. ("FPA") filed a timely notice of removal with the U.S. District Court for the Northern District of Oklahoma on April 14, 1999, setting forth a short and plain statement that the removal was based upon diversity jurisdiction and federal question jurisdiction in that the claims set forth in Plaintiffs'/Respondents' Petition "relate to an employee benefit plan" and therefore were preempted by ERISA (App. C, *infra*, p. 14a). All adverse parties were given written notice of

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[1] In Oklahoma state court, the initial filing by a Plaintiff is termed a "Petition" rather than a "Complaint".

the removal and Defendants filed a copy of the notice of removal with the Oklahoma state court.

On or about May 6, 1999, Plaintiffs moved to remand this action claiming, in part, that the district court lacked subject matter jurisdiction because: (1) the plan at issue was not governed by ERISA; and (2) the claim, as set forth in Plaintiffs' state court Petition, was not an ERISA claim and was not removable solely on the basis of Defendants' claim of ERISA preemption. Plaintiff relied on a recent Tenth Circuit decision, *Woodworker's Supply, Inv. v. Principal Mut. Life Ins.*, 170 F. 3d 985 (10th Cir. 1999), that was issued only nine days before the Notice of Removal was filed by Defendants.

The parties fully briefed these issues—whether the plan was an ERISA plan and whether Plaintiffs' claim was an ERISA claim and preempted. Indeed, at the status hearing held on July 1, 1999, the district court addressed the question of whether Plaintiffs' claims in this case were sufficiently related to the ERISA plan and benefits under the policy to require preemption. At that time, the district court asked for additional briefing on this issue and all parties subsequently submitted supplemental and response memoranda and evidentiary materials on this issue.[2]

C. The August 13, 1999, hearing on Plaintiffs' motion to remand.

At the August 13, 1999, hearing on Plaintiffs' Motion to Remand, the district court referred repeatedly to a *hypothetical* interpretation of the Petition that, if proven to be true, might *conceivably* bring this case within the

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[2] The briefs filed by Defendants, including evidentiary support and a partial transcript of the July 1, 1999, status hearing, were included as Exhibits to TAC's Motion to Amend the Notice of Removal. The Exhibits are reproduced in the Lodging filed concurrently with this Petition.

holding of *Woodworkers. See Hearing Transcript* (App. E., *infra,* p. 32a) (". . . my hypothetical could exist in this Petition"). In that situation, there would be no ERISA preemption and the court would not have subject matter jurisdiction. Throughout the hearing, the court went to great lengths to clarify that its interpretation of the Plaintiffs' Petition was only "hypothetical" and that it was in no way ruling that *Woodworkers* actually would apply or that ERISA would not ultimately preempt the claims set forth in Plaintitff's Petition. (App. E, *infra,* pp. 30a, 32a-37a, 41a-42a).

Despite this complete briefing and evidentiary submissions by both parties on whether Plaintiffs' claims as stated in the Petition are preempted by ERISA and therefore removable, the court indicated at the August 13, 1999, hearing that it would not reach the question of whether Plaintiffs' claims actually were preempted by ERISA (*See* App. E, *infra,* pp. 40a-42a). The court stated that it would not do so because it must look solely to the Plaintiffs' Petition and the Notice of Removal for facts to determine whether subject matter jurisdiction existed. "There is nothing that permits a federal court to take on board subsequent information after the point of removal . . ." (App. E, *infra,* p. 32a). (*See also* App. E, *infra,* p. 34a, 40a-41a). The court found that the Notice of Removal filed by TAC, as opposed to the evidentiary materials filed after removal, did not sufficiently distinguish *Woodworker's . Id.*

Defendants argued that the court's narrow reading of the Petition,[3] it's refusal to consider Plaintiffs' admis-

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[3] In interpreting the Petition, the Court rejected an interpretation of the reference to the TWU Optional Life Insurance Plan contained in ¶ 7 of the Petition and the request for damages caused by increased rates contained in ¶ 14 as an action seeking benefits under an employee welfare benefit plan. TAC submits this is an

sions [4] and the evidentiary material submitted in connection with the motions to remand and dismiss [5] and its heightened pleading requirement for a notice of removal under federal question jurisdiction were inconsistent with the applicable law as set forth herein.

D. Defendants' efforts to amend the notice of removal.

Although Defendants disputed that the applicable law sets forth such an exacting standard for a Notice of Removal, on August 17, 1999, Defendant TAC formally moved to amend its Notice of Removal (App. F, *infra*). Defendant FPA filed a Motion joining TAC's Motion to Amend on August 17, 1999. The motion sought leave to amend the Notice or for the district court to deem the Notice amended to include the arguments and evidence previously submitted to the court with the parties' briefs. All of the facts alleged existed at the time of removal and, thus, could properly be considered by the court. The proposed amended Notice was attached to the Motion

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equally valid interpretation of the Petition as the district court's hypothetical interpretation.

[4] Plaintiff admitted in his briefing papers that the Plan was in place between TAC and the Union before it went to the Union members. *See* Plaintiff's Supplemental Memorandum in Support of Motion to Remand and in Opposition to Motion to Dismiss at 3 (referenced in TAC's Motion to Amend (App. F, *Infra*) and included in the Lodging). This admission alone would have distinguished this case from *Woodworkers* had the Court considered the post-removal filings.

[5] The Plan documents, correspondence that proved the Plan was in place before it was taken to the Union members, and the Affidavit of John Pescitelli contain facts sufficient to distinguish this case from *Woodworkers* and establish complete ERISA Preemption. *See* TAC's Motion for Leave to File and Amended Notice of Removal, or in the Alternative, Request That Any Remand Order Clarify That It Is Not a § 1447 Order (App. F, *infra*), Amended Notice of Removal (App. G), and the exhibits attached to the Amended Notice of Removal (Lodging).

and sought simply to amend the original Notice of Removal to include the evidentiary materials submitted post-removal. (App. G., *infra*).

In their Motion, Defendants also sought to have the court clarify in any remand Order that it was not ruling on the merits of Plaintiff's Motion and thus was not determining that subject matter jurisdiction did not exist. Defendants did so in order to seek appellate review of the Court's decision to so narrowly construe the Notice of Removal and applicable law.

E. Denial of the motion to amend.

On August 20, 1999, the District Court issued its order denying the Motion to Amend the Notice of Removal and granting Plaintiffs' Motion to Remand the case to state court. The court specifically refused to consider any of the evidence or submissions made by the parties in their briefing on the Motion to Remand. Instead, relying on *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995), the court looked solely to the Petition and Notice of Removal to determine if there were sufficient facts to distinguish this case from the hypothetically applicable *Woodworker's* decision. (App. B, *infra*, p. 11a). The court concluded that the petition filed by Plaintiffs in state court *could* be read to state a claim falling within *Woodworker's*, which would not be preempted and removable, because Defendants' Notice of Removal itself, as opposed to the briefs and submissions in connection with Plaintiff's Motion to Remand, did not distinguish *Woodworker's*. (App. B, *infra*, pp. 10a-11a). Thus, Defendants had not met their burden of establishing jurisdiction. The Court also summarily denied the Defendants' Motion to Amend the Notice of Removal, again citing to *Laughlin*. (App. B, *infra*, p. 11a).

Petitioners filed a timely Notice of Appeal and a petition for writ of mandamus in the U.S. Court of Appeals for the Tenth Circuit. On October 20, 1999, the Tenth Circuit dismissed Petitioners' appeal and mandamus petitions, finding that the district court's decision remandng the case to state court was not subject to review either *via* direct appeal or mandamus. The Tenth Circuit also rejected Defendants' appeal of the district court's order denying the Motion to Amend the Notice of Removal, stating that it was not convinced that the alleged jurisdictional defects were mere technicalities that justified amendment under *Hendrix v. New Amsterdam Cas. Co.*, 390 F.2d 299 (10th Cir. 1968), and *Buell, Sears, Roebuck & Co.*, 321 F.2d 468 (10th Cir. 1963) (App. A, *infra*, p. 4a).

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT OPINION CONFLICTS WITH 28 U.S.C. § 1653 AND THIS COURT'S OWN CASE LAW REGARDING AMENDMENT OF A NOTICE OF REMOVAL

The decisions of the courts below that amendment of the Notice of Removal should not have been permitted is directly contradicted by 28 U.S.C. § 1653 and this Court's own case law permitting such amendment. The district court asserted that there was "no authority which supports an amendment of the Natice of Removal under the circumstances here, as *the court must look to the record supporting the Court's jurisdiction at the time of removal*." (App. B, *infra*, p. 11a) (emphasis added). This contention is refuted by the plain language of 28 U.S.C. § 1653, which states that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." Simply put, the district court's conclusion that the record is closed at the time the Notice of

Removal is filed cannot be reconciled with the plain lan- this flawed decision, stating that it did not believe that guage of 28 U.S.C. § 1653. The Tenth Circuit affirmed "the jurisdictional defects in these cases are mere technicalities that justify amendment. . . ." (App. A, *infra*, p. 4a).

In truth, Defendants' failure to include in the Notice of Removal all possibly relevant facts necessary to support a finding of federal question jurisdiction is *exactly* the kind of "jurisdictional defect" for which amendments under 28 U.S.C. § 1653 are permitted. In *Willingham v. Morgan*, 395 U.S. 23 (1969), this Court *sua sponte* considered an arguably defective Notice of Removal to have been amended by materials subsequently submitted in connection with a motion for summary judgment. In that case, the defendant warden and chief medical officer of a federal penitentiary had removed the case under 28 U.S.C. § 1442(a)(1), which permits removal to federal court of any civil action against a federal officer "for any act under color of [his] office." The district court denied the plaintiff's motion to remand and granted summary judgment under the official immunity doctrine of *Barr v. Mateo*, 360 U.S. 564 (1959).

The Court of Appeals for the Tenth Circuit reversed, finding insufficient basis in the record to deny the motion to remand. Specifically, the plaintiff in his motion for remand had argued that the officials were on a 'frolic' and that the removal provisions of 28 U.S.C. § 1442(a)(1) were therefore inapplicable. *Willingham* at 407. This Court acknowledged that the only evidence refuting the "frolic" argument were affidavits that appeared in defendant's motion for summary judgement and therefore had not been part of the record at the time of removal. *Id.* at 408.

Though noting that this additional evidentiary material "should" have appeared in the Notice of Removal, this Court considered this evidentiary material as constituting an amendment of the Notice under § 1653, and therefore concluded that the district court properly had jurisdiction over the case. In this regard, this Court stated as follows:

> This material should have appeared in the petition for removal. However, for purposes of this review it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits. *See* 28 U.S.C. § 1653; *Buell v. Sears, Roebuck, & Co.*, 321 F.2d 468 (10th Cir. 1963); *Firemen's Ins. Co. v. Robbins Coal Co.*, 288 F.2d 349 (5th Cir.), *cert. denied*, 368 U.S. 875 (1961). *See also American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts*, 264-265 (Tentative Draft No. 6, 1968).

Id. at fn. 3.

Willingham is on all fours with the instant case and compels the conclusion that 28 U.S.C. § 1653 permits amendment of a Notice of Removal to include evidentiary materials submitted after the filing of the Notice. The *Willingham* plaintiff's argument in his motion to remand that the defendants were on a frolic is directly analogous to the instant plaintiffs' argument that *Woodworker's* barred complete preemption of Plaintiffs' claims. Accordingly, the district court below should have granted Defendants' motion to amend their Notice of Removal to include the additional evidentiary materials supporting Defendants' argument that *Woodworkers* was not applicable and that Plaintiffs' claims were completely preempted by ERISA.

Indeed, where a defendant has alleged a correct basis for the existence of federal jurisdiction, it is well settled

that a defendant may amend its notice of removal under 28 USC § 1653. *See Watkins v. Terminix Int'l Co., Ltd.*, 1997 U.S. App. LEXIS 36294 (10th Cir. 1997); *Hendrix v. New Amsterdam Cas. Co.*, 390 F.2d 299 (10th Cir. 1968); *Buell v. Sears Roebuck & Co.*, 32 F. 2d 468 (10th Cir. 1963). For example, in *Watkins*, the Tenth Circuit remanded the case to the district court to allow the defendant to seek leave to amend its notice of removal "to plead facts which would establish the existence of complete diversity." *Id.* In that case, the defendant apparently had failed to allege the citizenship of the general and limited partners of defendant.

Similarly, in *Wormley v. Southern Pacific Trans. Co.*, 863 F. Supp. 382 (E.D. Tex. 1994), the court granted leave to amend where the defendant had failed to adequately plead jurisdiction:

> It is clear that the jurisdiction of this court is balanced upon the existence of a contract of indemnity between Amtrak and Southern Pacific. Without such a contract, Amtrak would be unable to remove this case. *In re Wilson Industries, Inc.*, 886 F. 2d 93, 96 (5th Cir. 1989) (holding that indemnity based on a tort theory is not a separate 1441(c) claim). Failure to plead the existence of the contract in the Notice of Removal is a jurisdictional defect. That Amtrak owes some type of indemnity was plead in the Notice of Removal. An amendment to the original Notice of Removal would merely clarify what type of "full indemnity" Amtrak owes Southern Pacific. See *Woodlands II v. City Sav And Loan Ass'n*, 703F. Supp. 604, 607 (N.D. Tex. 1989) (stating that amendment to remedy defective allegation of jurisdiction should be permitted) and *Milstead Supply Co. v. Cas. Ins. Co.*, 797 F. Supp. 569, 574 (W.D. Tex. 1992) (defendant allowed to amend "imperfect, general allegation of diversity jurisdiction").

The common theme running through these and many other cases permitting such amendments is not to let technical or other inadvertence in pleading preclude practical consideration of the true jurisdictional facts. *See, e.g., Heller v. Komatsu Forklift Co.*, 869 F. Supp. 612 (N.D. Ill. 1994) (court accepted an amended notice of removal finding jurisdictional defect completely curable). *Yarnevic v. Brink's Inc.*, 102 F.3d 753 (4th Cir. 1996); *State of Montana v. Christopher*, 345 F. Supp. 60 (D. Mt. 1972) (proper for the court to consider removal petition as if it had been amended "to include the relevant information contained in the later filed affidavits"). In *Hendrix*, the Tenth Circuit stated the purpose of permitting amendments as follows:

> Without questioning that removal requirements should be strictly applied, *the statute authorizing correction of defects by amendment to conform to the true facts should not be dissipated in the process,* but should be given practical effect in accordance with its apparent intent. To be unduly restrictive in determining "defects" amendable under the statute in removal proceedings in principle would preclude the practical correction of similar inadvertences in proceedings originally brought in the federal courts, since the statute concerning amendments pertains to both.

(*emphasis added*). Likewise, in *Buell*, the Tenth Circuit explained that the very same rule requiring courts to consider complaints as if amended to conform to the evidence, applies to a notice of removal:

> The same rules apply to petitions for removal as to complaints both as to the necessity of affirmatively showing the foundations for jurisdiction and as to amendments to show jurisdiction in conformance with proof.

321 F.2d at 470.

Application of this well-established authority in this case required the district court to either deem Petitioner's Notice of Removal amended to comport to the subsequently submitted evidence and/or to allow Petitioners to file an amended Notice of Removal. If it had considered these materials, the court's *hypothetical* application of *Woodworker's* could not stand as the evidentiary materials contained facts which distinguish this case from the *Woodworker's* decision. Such a determination would not have prejudiced any party. Indeed, Plaintiffs did not move to remand based on any argument concerning Petitioners' pleading, and the parties fully briefed the subject matter jurisdiction issue facing the court, namely, whether Plaintiffs' claims are preempted by ERISA.[6]

On the other hand, Petitioners will suffer significant prejudice from a remand of this action to state court without a ruling on subject matter jurisdiction despite the fact that the true facts, which existed at the time of removal and were before the district court, established ERISA preemption. Such a result is exactly what 28 U.S.C. § 1653 is intended to forestall by permitting amendments to cure defective allegations of jurisdiction.

II. THE TENTH CIRCUIT OPINION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Tenth Circuit's decision not to permit amendment of the Notice of Removal is in direct conflict with the decisions of other federal courts of appeal and district courts that have considered the issue. The vast majority of courts have concluded that a defendant has the *right* to amend its Notice of Removal under 28 U.S.C. § 1653

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[6] Petitioners' Proposed Amended Notice of Removal attached hereto incorporated the clarification, facts and evidence submitted with the parties' prior filed memoranda (App. G, *infra*, and lodging).

even after the expiration of the thirty day limit contained in 28 U.S.C. 1446(b). Those courts have permitted such amendment where the amendment does not raise a wholly new ground for removal but simply provides additional factual support for a removal ground stated in the Notice of Removal.

Illustrative of those cases is the decision of the United States Court of Appeals for the Sixth Circuit in *Gafford v. General Electric Company*, 997 F.2d 150 (6th Cir. 1993), where the defendant alleged diversity jurisdiction in its Notice of Removal but failed to specify its principal place of business. In permitting the defendant to amend its Notice of Removal more than thirty days after filing the Notice, that court stated as follows:

> If and to the extent that GE's petition for removal was technically deficient in its assertion of its principal place of business, it was cured by subsequent information GE supplied to the district court and entered into the record in this case. *See Giangola v. Walt Disney World Co.*, 753 F. Supp. 148, 153, n.5 (D.N.J. 1990) ("The information submitted after the issue of the removal's propriety was raised constitutes an amendment of the petition. Because diversity of the parties was alleged in the original petition, defendant could amend by providing allegations of greater specificity even after the thirty day limit to file a new petition had expired.") n.6; cf. 28 U.S.C. § 1653 (1988) ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."); *Barrow Dev. Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317-318 (9th Cir. 1969); *Hendrix v. New Amsterdam Casualty Co.*, 39 F.2d 299, 300-02 (10th Cir. 1968); *Stanley Electric Contractors, Inc. v. Darin & Armstrong Company*, 486 F. Supp. 772-

773 (E.D. KY 1980); *Jackson v. Metropolitan Life Ins. Co.*, 433 F. Supp. 707, 709 (E.D. KY. 1977). *Id.* at 164.

Courts in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits also have held either that 1) amendments should be permitted under 28 U.S.C. § 1653 even after thirty days to add additional facts supporting a claim of jurisdiction that was raised in the Notice of Removal or 2) specific facts supporting jurisdiction need not be included in the Notice of Removal. *See Lupo v. Human Affairs International*, 28 F.3d 269, 272-273 (2d Cir. 1994) (amendments to clarify grounds for removal asserted in Notice of Removal are permissible, but defendant may not amend Notice to add claim of diversity jurisdiction where Notice alleged only federal question jurisdiction); *Holly Farms Corporation v. Taylor*, 722 F. Supp. 1122 (D. Del. 1989); *Nutter v. New Rents, Inc.*, 1991 U.S. LEXIS 22952 (4th Cir. 1991); *Schild v. Tymco, Inc.*, 842 F. Supp. 225, 226 (M.D. La.); *Rachel v. State of Georgia*, 342 F.2d 336, 339 (5th Cir. 1965) ("rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings" and "the absence of detailed grounds setting forth basis for removal is not fatal to defendants' right to remove."); *Shaw v. Dow Brands, Inc.*, 994 F.d 364, 368-369 (7th Cir. 1993); *LeNeave v. North American Life Assurance Co.*, 642 F. Supp. 1453, 1455 (D. Minn. 1986) (noting that even courts adhering to a "strict construction" of the right to amend under 28 U.S.C. § 1653 permit such amendments to "cure technical defects or to amplify the allegations of the petition [for removal]"); *Barrow Dev. Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317-318 (9th Cir. 1969); *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 282 (11th Cir. 1987).

III. THE TENTH CIRCUIT OPINION CONFLICTS WITH THE "SHORT AND PLAIN STATEMENT" REQUIREMENT OF 28 U.S.C. § 1446(a).

In 1988, Congress amended 28 U.S.C. § 1446(a). That amendment reduced the level of specificity required in the Notice of Removal. As noted in Federal Practice and Procedure, § 3733, Wright & Miller:

> Prior to the 1988 revisions of Section 1446(a), the petition for removal was required to contain a 'short and plain statement *of the facts*' that entitled the defendants to remove, including specific allegations as to the grounds upon which the federal court's subject matter jurisdiction rested if that did not appear in the state court pleadings. This requirement has been modified to require only that the grounds for removal be stated in "a short and plain statement" —terms borrowed from the pleading requirements set forth in Federal Rule of Civil Procedure 8(a).

Id. (emphasis added). This amendment meant that the Notice of Removal no longer need contain a "short and plain statement *of the facts*" stating the grounds for removal; rather, the Notice need only contain a "short and plain statement" stating the grounds for removal.

As noted above, the "short and plain statement" requirement corresponds precisely with the level of specificity required for pleadings under Rule 8(a). The unavoidable conclusion is that Congress sought to reduce the level of specificity required for removal by no longer requiring defendants to specify the "facts" supporting removal. Even to the extent factual allegations were required prior to the 1988 amendments, all that was required was a "short and plain statement" of those facts. At the least, nothing in either the governing statutes or the relevant legislative history supports the Tenth Cir-

cuit's extreme position that all facts relevant to a determination of subject matter juirsdiction must be contained in the Notice of Removal.

The Tenth Circuit's refusal to permit the Defendants to file an amended Notice of Removal, effectively holding that a district court may consider only the allegations contained in the Complaint and Notice of Removal, is particularly unreasonable in light of the complexity of ERISA preemption issues. Whether a particular claim is completely preempted by ERISA can be an extremely complicated issue, both factually and legally. *See e.g., Woodworkers.* The size of the Lodging included with this Writ demonstrates the impracticality of the Tenth Circuit's position. The Tenth Circuit's position effectively would require a removing defendant to file a full-fledged brief, including supporting affidavits and exhibits, as its notice of removal in order to ensure that its right to remove is preserved. Given the relatively short thirty-day time period for filing a Notice of Removal, this will be impractical, if not impossible, in many cases.

In sum, Petitioners have located no authority requiring a party to include all facts in a notice of removal necessary to distinguish all cases that may hypothetically be relied upon by a Plaintiff in a Motion to Remand. To require Petitioner to plead all facts in the Notice itself necessary to distinguish all such authority elevates form over substance, which is what the notice pleading requirements of Fed. R. Civ. P. 8(a) and 28 U.S.C. § 1653 seek to avoid. Indeed, such an unduly narrow interpretation of 28 U.S.C. § 1653 would compel the filing of potentially detailed, if not voluminous, notices of removal, in clear contravention of the requirement that such notices contain only a "short and plain statement of the grounds for removal." *See* 28 U.S.C. § 1446(a).

IV. SUMMARY.

The Tenth Circuit's affirmation of the district court's denial of Defendants' Motion to Amend the Notice of Removal undercut the carefully-balanced legislative scheme underlying removal jurisprudence. 28 U.S.C. § 1446(a) requires that a defendant seeking removal file a "short and plain statement" of the grounds for removal. 28 U.S.C. § 1653 permits amendments of pleadings, including notices of removal, in the trial or appellate court to correct defective allegations of jurisdiction. The clear import of these two statutes is that defendants are not required to plead in their notice of removal every fact possibly relevant to a final determination as to whether a district court has subject matter jurisdiction. Rather, 28 U.S.C. § 1446(a) contemplates notice pleading for a notice of removal, and 28 U.S.C. § 1653 permits defendants to flesh out a notice of removal by permitting amendment of such notices.

By refusing to permit amendment of the Notice of Removal, the courts below confused the requirement that jurisdiction exists at the time of removal with a nonexistent requirement that the existence of jurisdiction be *proven* conclusively at the time of removal. This clearly incorrect premise was stretched to the point where it effectively required Defendants to file a Notice of Removal that contained all the facts necessary to distinguish a Tenth Circuit opinion that was *hypothetically* applicable to the Plaintiffs' claims. This decision was inconsistent with both the controlling statutory provisions and this Court's own decisions. Moreover, given that the hypothetically applicable decision was filed only nine days before Defendants filed their Notice of Removal, the refusal to permit amendment of the Notice meant that Defendants had no reasonable opportunity to meet this erroneous standard.

The need to review the rogue decision of the Tenth Circuit is particularly important because many decisions as to the propriety of a remand order are nonreviewable. *See* 28 U.S.C. § 1447(d). Thus, there is no remedy when a district court makes an erroneous *substantive* deicsion that there is no federal jurisdiction. Because such substantive decisions are nonreviewable, this Court should ensure that the district courts undertaking a removal analysis properly follow *all* of the removal-related statutes enacted by Congress.

The importance of the issues presented by this case is heightened because this case concerns a body of law for which Congress has established complete federal preemption. This Court has stated that "the express preemption provisions of ERISA are deliberately expansive". *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 5895 (1987). The decision by the Tenth Circuit effectively narrows those preemption provisions because it permits a district court to deny a federal forum for completely preempted ERISA claims even when the district court itself believes that the case may be preempted by ERISA. Given Congress' expressed desire to have federal law—and federal courts—control the interpretation of ERISA, this Court should closely scrutinize lower court deicsions that violate Congress' expressed legislative intent. Accordingly, this case presents issues of sufficient interest to the public that the Court should accept this case for review.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 18, 2000

APPENDICES

APPENDIX A

[Filed Oct. 20, 1999]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 99-5180
(D.C. No. 99-CV-269)
(N.D. Okla.)

IN RE: TRANSAMERICA ASSURANCE COMPANY,
Petitioner.

No. 99-5185
(D.C. No. 99-CV-269-H)
(N.D. Okla.)

EARL TILLERY, and 469 others individually
and on behalf of all others similarly situated,
Plaintiff-Appellee,

v.

TRANSAMERICA ASSURANCE COMPANY,
A foreign Insurance Corporation,
Defendant-Appellant,

and

FUTURE PLANNING ASSOCIATES, INC.,
Defendant.

No. 99-5188
(D.C. No. 99-CV-269-H)
(N.D. Okla.)

IN RE: FUTURE PLANNING ASSOCIATES, INC.,
Petitioner.

No. 99-5191
(D.C. No. 99-CV-269-H)
(N.D. Okla.)

EARL TILLERY, and 469 others individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

v.

FUTURE PLANNING ASSOCIATES, INC.,
Defendant-Appellant,

and

TRANSAMERICA ASSURANCE COMPANY,
A foreign Insurance Corporation,
Defendant.

ORDER AND JUDGMENT *

Before ANDERSON, BRORBY, and LUCERO, Circuit Judges.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

These appeals and petitions for writ of mandamus present the same question arising from the same underlying case, *Tillery v. Transamerica Assurance Co.*, district court No. 99-CV-0269. Plaintiffs originally sued defendants Transamerica Assurance Company and Future Planning Associates, Inc., in state court. Defendants removed the case to federal court. They seek to overturn the district court's August 20, 1999 order remanding the case to state court. Defendants were uncertain as to which procedural vehicle to use, so they both filed both a mandamus petition and an appeal.

The threshold question, however, is whether the district court's remand order is reviewable at all. *See SBKC Serv. Corp. v. 1111 Prospect Partners, L.P.*, 105 F.3d 578, 580 (10th Cir. 1997). In general, a remand ordered on a ground authorized by 28 U.S.C. § 1447(c) "is not reviewable 'on appeal or otherwise.'" *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam) (quoting 28 U.S.C. § 1447(d)). The district court remanded on the basis that it lacked federal subject matter jurisdiction under § 1447(c). Our review is therefore limited to determining independently whether the remand order was actually "based to a fair degree upon the court's finding that it lacked subject matter jurisdiction to hear the case," *Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1184 (10th Cir. 1998) (quotation omitted), *cert. denied*, 119 S. Ct. 799 (1999), and whether that determination was made in good faith, *see Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997). If we find that the district court decided in good faith that it lacked subject matter jurisdiction, then the remand order is otherwise nonreviewable. *See Dalrymple*, 145 F.3d at 1184; *Archuleta*, 131 F.3d at 1362.

The district court determined that there was no diversity jurisdiction because the complaint did not estab-

lish that the amount in controversy exceeded $75,000, and defendants had failed to set forth specific facts in their notice of removal to show that it did. The district court also determined that there was no federal question jurisdiction because the complaint could be read to state a state-law claim that was not preempted by the Employee Retirement Income Security Act (ERISA), and defendants had failed to set forth specific facts in their notice of removal to support their assertion that plaintiffs' claims were based on an employee welfare benefit plan covered and preempted by ERISA. The district court rejected defendants' motion to amend their pleadings to cure the jurisdictional deficiencies, on the basis that it was required under *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) to assess jurisdiction based on the record that existed at the time of removal.

We find that the district court's remand order was actually based on the absence of federal subject matter jurisdiction. Further, defendants have not shown that the district court's reliance on *Laughlin*'s requirement to assess jurisdiction based on the record at the time of removal was not in good faith. Finally, we are not convinced that the jurisdictional defects in these cases are mere technicalities that justify amendment under *Hendrix v. New Amsterdam Cas. Co.*, 390 F.2d 299 (10th Cir. 1968) and *Buell v. Sears, Roebuck & Co.*, 321 F.2d 468 (10th Cir. 1963).

Therefore, the district court's remand order is nonreviewable, and we lack jurisdiciton over these appeals and these mandamus petitions. They are therefore DISMISSED. The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

APPENDIX B

[Filed Aug. 20, 1999]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

99-CV-269-H(M)

EARL TILLERY and 469 Others, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

TRANSAMERICA ASSURANCE COMPANY, a foreign insurance corporation, and FUTURE PLANNING ASSOCIATES, INC., a corporation,
Defendants.

ORDER

This matter comes before the Court on Plaintiffs' Motion for Remand filed May 6, 1999 (Docket #8). The Court heard argument on the motion on August 13, 1999, and at that time stated, based upon a review of the arguments and authorities presented by counsel in the original and supplemental briefs on the matter, that it is without subject matter jurisdiction over the instant case and Plaintiffs' Motion to Remand would be granted.

I

This suit was initially filed on March 19, 1999, in Tulsa County District Court. Defendants in this case

filed a Notice of Removal on April 14, 1999. Defendants' Notice of Removal provides in pertinent part:

> 2. The value of the matter in controversy in this case exceeds $75,000, exclusive of interests and costs.
>
> 3. Transamerica Assurance Company is a Missouri corporation, with its principal place of business located in Los Angeles, California.
>
> 4. FPA is a New York corporation, with its principal place of business located in New York.
>
> 5. Plaintiffs are residents and citizens of the State of Oklahoma and no defendant is a citizen or resident of Oklahoma. The Defendants, therefore, are of complete diversity of citizenship from plaintiffs.
>
> 6. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1), which provides that the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states. The entire action may therefore be removed pursuant to 28 U.S.C. § 1446(b).
>
> 7. In addition, this Court had federal question and subject matter jurisdiction over this action pursuant to 29 U.S.C. §§ 1001, et seq. (ERISA), in that plaintiffs' claims "relate to" an employee benefit plan. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

See Defendant's Notice of Removal at 2-3, ¶¶ 2-7. In support of their Notice of Removal, Defendants appended

only a copy of Plaintiffs' state court petition. *See id.* at ex. A. Plaintiffs' state court petition, in part, alleges that Defendants "presented an insurance plan to members of the Transport Worker's Union of America, referred to as the "TWU Optional Term Life Insurance Plan" (OTP)[,]" and that in promoting the plan, Defendants made materially false representations "at numerous meetings of TWU workers." *See* Petition, at 2-3, ¶¶ 7, 9.

In response to Plaintiffs' Motion to Remand, Defendants respond that this Court may exercise jurisdiction over this matter because they have adequately alleged in their Notice of Removal sufficient facts to support a finding that diversity jurisdiction and federal question jurisdiction exist. The Court will address each of these matters in turn.

II

It is well-settled that federal courts are courts of limited jurisdiction. If at any time before final judgment it appears the court lacks subject matter jurisdiction, this Court must remand the matter to state court. *See* 28 U.S.C. § 1447(c). Initially, the Court notes that with respect to diversity jurisdiction, "[d]efendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly: where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed $75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in deter-

mining whether an amount in controversy is greater than $75,000. The Tenth Circuit stated:

> [t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the "*underlying facts* supporting [the] assertion that the amount in controversy exceeds [$75,000]." Moreover, there is a presumption against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citations omitted) (emphasis in original); *e.g.*, *Hughes v. E-Z Serve Petroleum Marketing Co.*, 932 F. Supp. 266 (N.D. Okla. 1996) (applying *Laughlin* and remanding case); *Barber v. Albertson's, Inc.*, 935 F. Supp. 1188 (N.D. Okla. 1996) (same); *Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co.*, 932 F. Supp. 264 (N.D. Okla. 1996) (same); *Herber v. Wal-Mart Stores*, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); *Homolka v. Hartford Ins., Group, Individually and d/b/a Hartford Underwriters Ins., Co.*, 953 F. Supp. 350 (N.D. Okla. 1995) (same); *Johnson v. Wal-Mart Stores, Inc.*, 953 F. Supp. 351 (N.D. Okla. 1995) (same); *Maxon v. Texaco Ref. & Marketing Inc.*, 905 F. Supp. 976 (N.D. Okla. 1995) (same).

Further, "both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice." *Laughlin*, 50 F.3d at 873. *See Associacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A.*, 988 F.2d 559, 565 (5th Cir. 1993) (finding defendant's conclusory statement that "the matter in controversy exceeds

[$75,000] exclusive of interest and costs" did not establish that removal jurisdiction was proper); *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds $75,000 is not sufficient to establish removal jurisdiction).

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of *Laughlin* requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds $75,000, but also *facts* underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than $75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. *Laughlin*, 50 F.3d at 873. *See Herber*, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in *Johnson v. Wal-Mart Stores, Inc.*, 953 F. Supp. 351 (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds $75,000.00, then the rationale of *Laughlin* contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with *underlying facts.*

In its notice of removal, Defendants failed to set forth any specific facts that demonstrate the federal amount in controversy has been met. Neither Plaintiff's Petition or Defendants' Notice of Removal indicate that the amount in controversy here exceeds $75,000. Indeed, Defendant Future Planning Associates, Inc. admits in its response brief that "the relevant allegations as to the amount in

controversy may not be in strict compliance with . . . *Laughlin*[.]" Combined Reply to Defendants' Motions to Dismiss and Response in Opposition to Plaintiffs' Motion to Remand. at 1-2 n.1. Accordingly, the Court finds that Defendants' conclusory assertions contained in their Notice of Removal do not satisfy the standards set forth by the Tenth Circuit in *Laughlin*, and concludes that removal is improper on the basis of diversity jurisdiction.

III

Defendants further allege that removal is proper in this case on the basis of federal question jurisdiction. It is settled law that a suit arises under federal law, and is thus removable to federal court, only where the plaintiff's statement of his or her own cause of action shows that it is based on federal law. *See Schmeling v. Nordam*, 97 F.3d 1336, 1339 (10th Cir. 1996). Defendants assert that the claims contained in Plaintiffs' Petition relate to an employee benefit plan and are thus subject to, and are preempted by, ERISA. *See generally*, 29 U.S.C. §§ 1001, et seq. Plaintiffs respond that the Petition may be read to state a claim under *Woodworker's Supply, Inc. v. Principal Mutual Life Ins.*, 170 F.3d 985 (10th Cir. 1999). At the hearing, Defendants' counsel admitted that the Petition could be so construed, but sought to distinguish this action form *Woodworker's Supply* based on statements by the attorneys at the hearing relating to the nature of the plan at issue and the role of the union in offering the plan to Plaintiffs. Such statements, however, were neither supported by affidavit or other admissible evidence nor made part of the record at the time Defendants filed the Notice of Removal in this Court. Thus, Defendants have failed to set forth any specific facts that demonstrate the unsupported assertion in their motion that the claim set forth in Plaintiffs' Petition relates to

an employee welfare benefit plan. Since Plaintiffs' Petition may be read to state a cause of action under Oklahoma law of the kind permitted to proceed in state court under *Woodworker's Supply*, the Court concludes that Defendants have not met their burden of establishing that jurisdiction is proper in federal court. Accordingly, the Court is without subject matter jurisdiction over this case and this matter is hereby remanded to the Oklahoma District Court for the District of Tulsa pursuant to 28 U.S.C. § 1447(c).

IV

At the hearing, Defendants requested leave to file a request that the order granting remand in this case be entered in such a way as to be appealable. Subsequently, Defendants filed Motions for Leave to Amend the Notice of Removal or in the Alternative, to Request that Any Remand Order Clarify that it is a Non-§ 1447(c) Order. With respect to the former request, the Court finds that there is no authority which suports an amendment of the Notice of Removal under the circumstances here, as the Court must look to the record supporting the Court's jurisdiction at the time of filing such Notice of Removal. *See Laughlin*, 50 F.3d at 873.[1] With regard to the alternative request, the Court concludes that there is no legal basis upon which this Court's order of remand due to lack of subject matter jurisdiction may be made ap-

---

[1] In support of their request, Defendants point to 28 U.S.C. § 1653, which provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." However, the Court finds nothing in § 1653 or the controlling authorities which construe it alters the requirements of *Laughlin*, *see, e.g., Hendrix v. New Amsterdam Casualty Co.*, 390 F.2d 299, 300 (10th Cir. 1968), and thus this statute cannot serve as a basis for supplementing the fact record after a court states at a motion for remand hearing that the record is insufficient to support federal question jurisdiction and an order will be entered forthwith granting the subject motion.

pealable. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."). Therefore, Defendants' Motions for Leave to Amend the Notice of Removal or in the Alternative, to Request that Any Remand Order Clarify that it is a Non-§ 1447(c) Order filed August 17, 1999 are hereby denied.

Based on the above, the Clerk of the Court is hereby directed to remand this matter to the Tulsa County District Court for the State of Oklahoma.

IT IS SO ORDERED.

This 20th day of August, 1999.

/s/ Sven Erik Holmes
SVEN ERIK HOLMES
United States District Judge

APPENDIX C

[Filed Apr. 14, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 99CV0269H (M)

EARL TILLERY, *et al.*,

Plaintiffs,

v.

TRANSAMERICA ASSURANCE COMPANY, *et al.*,

Defendants.

Tulsa, Oklahoma
District Court of Tulsa County
Case No. CJ 99 1311

NOTICE OF REMOVAL

Defendants Transamerica Assurance Company ("TAC") and future Planning Associates, Inc. ("FPA") hereby file their Notice of Removal of the above captioned action to the United States District Court for the Northern District of Oklahoma from the District Court of Tulsa County and for their Notice of Removal states:

1. On March 19, 1999, plaintiffs Earl Tillery and 469 others commenced an action in the District Court of Tulsa County, Oklahoma, styled: *Earl Tillery, et al., v. Transamerica Assurance Company, et al.;* Case No. CJ 99 1311. On March 25, 1999, the Complaint in that action was served upon the Insurance Commissioner of Oklahoma as designated agent for service of process of foreign insurance companies doing business in the State of Oklahoma under U.S. 36, Section 621B, a true copy of which is attached hereto as *Exhibit A,* as provided by 28 U.S.C. § 1446(a). FPA was served with a copy of said Com-

plaint on March 30, 1999. No defendant received any copy of the Summons, Complaint, or any other document from which it could be determined that this case could be removed at any time prior to March 25, 1999. All defendants join in this notice of removal.

2. The value of the matter in controversy in this case exceeds $75,000.00, exclusive of interest and costs.

3. Transamerica Assurance Company is a Missouri corporation, with its principal place of business located in Los Angeles, California.

4. FPA is a New York corporation, with its principal place of business located in New York.

5. Plaintiffs are residents and citizens of the State of Oklahoma and no defendant is a citizen or resident of Oklahoma. The defendants, therefore, are of complete diversity of citizenship from plaintiffs.

6. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1), which provides that district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between citizens of different states. The entire action may therefore be removed pursuant to 28 U.S.C. § 1446(b).

7. In addition, this Court has federal question and subject matter jurisdiction over this action pursuant to 29 U.S.C. §§ 1001, *et seq.* (ERISA), in that plaintiffs' claims "relate to" an employee benefit plan. *See Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987).

8. This Notice of Removal is being filed within thirty (30) days after the date the Complaint was received by TAC and FPA. Therefore, this Notice of Removal is timely filed in accordance with 28 U.S.C. § 1446(b).

9. Written notice of the filing of this Notice of Removal will be given to all parties, together with a copy of

the Notice of Removal. A Notice of Filing of Notice of Removal will also be promptly filed with the Clerk of Courts of the District Court of Tulsa County, Tulsa, Oklahoma.

10. There is filed herewith, and by reference made a part hereof, a true and correct copy of all process, pleadings, and orders served upon TAC and FPA in this action, as provided by 28 U.S.C. § 1446(a) (*See Exhibit A*).

WHEREFORE, defendants Transamerica Assurance Company and Future Planning Associates, Inc. pray that this Court enter this cause on its docket and entertain such further proceedings herein as may be proper and authorized by law.

Respectfully submitted,

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APPENDIX D

[Filed Mar. 19, 1999]

IN THE DISTRICT COURT
IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

Case No. CJ 99 1311

Jury Trial Demanded

EARL TILLERY and 469 others, individually and on behalf of all others similarly situated,
Plaintiff,

v.

TRANSAMERICA ASSURANCE COMPANY, a foreign insurance corporation, and FUTURE PLANNING ASSOCIATES, INC., a corporation,
Defendants.

PETITION

COME NOW Plaintiffs and for their claims and causes of action against the Defendants and each of them states and alleges:

1. Plaintiff Earl Tillery is a resident of Tulsa County, State of Oklahoma.

2. The other Plaintiffs are those persons listed on Exhibit "A" which is attached hereto and is incorporated herein by reference.

3. Plaintiffs bring this action individually and on behalf of all other persons similarly situated, pursuant to 12 O.S. § 2023.

4. Defendant TransAmerica Assurance Company is a corporation domesticated in the State of Oklahoma writing insurance in the State of Oklahoma.

5. Defendant Future Planning Associates, Inc., is a corporation doing business in Oklahoma.

6. At all times material herein Defendants have acted by and through their agents, servants and employees who were acting within the scope of their agency, service and employment.

7. In 1995 Defendant Future Planning Associates, as an insurance agent for TransAmerica Insurance Company, presented an insurance plan to members of the Transport Workers Union of America, referred to as the "TWU Optional Term Life Insurance Plan" (OTP). The purpose of setting forth the plan was as an alternative optional term life insurance plan to that of TWU members who were employees of American Airlines because the plan sponsored by the American Airlines had had a large increase in premium rates.

8. In promoting this plan, Defendants indicated that the "risk pool" in which plan participants would be placed would be a large one of approximately 30,000 people, and that the risk pool would not be limited to persons under this particular plan. Defendants further indicated that the rate at which the insurance was offered would remain constant, but if it were increased it would never be increased by more than $.03 to $.05 per $1,000. Further, Defendant represented that any change in insurance premium rates would be made only by experience, not by age.

9. The above representations were made numerous times by Defendants at numerous meetings of TWU workers and there are many witnesses thereto.

10. The above representations made by Defendants were material misrepresentations that were false. When Defendants made the representations they knew of their falsity or made them as a positive assertion recklessly, without any knowledge of their truth. Further, Defendants made the representations with the intention that they should be acted upon by Plaintiffs who in fact acted in reliance upon them and have suffered injury thereby.

11. Alternatively, the Plaintiffs state that Defendants knew or should have known that the representations that they made would not or could not be fulfilled actuarially, and negligently misrepresented the insurance to Plaintiffs and those similarly situated.

12. As a result of the rates which were set in the plan of $.40 per $1,000 of coverage, there was a large participation of older employees in the plan with only a small participation of younger employees who could buy similar coverage elsewhere cheaper. Accordingly, those who participated in the plan tended to be older which caused Defendants to have a greater loss experience than would otherwise have been the case. However, Defendants knew or should have known that this result would obtain. Almost immediately after Plaintiffs and others similarly situated entered into the plan, Defendants attempted to modify the rates because of the foreseeable loss experience. Thus, it appears that Defendants were engaging in a "bait and switch" scheme.

13. Within the last few months Defendants have given notice that the old policy has been replaced by a new policy with different terms, have increased the rates by up to 96%, have changed rates so that they are now based on age, have reduced the death benefits, and have otherwise done things that they said they woud not do.

14. As a result of the fraudulent or negligent acts of Defendants, Plaintiffs have suffered damages in the form of increased rates.

15. In other ways Plaintiffs have detrimentally relied upon the false or negligent representations of Defendants. For example, many workers have retired, keeping the insurance, and electing their retirement package so that it was smaller for the surviving spouse in reliance upon this insurance being available at the rates and in the amounts represented.

16. Defendants have acted in bad faith with regard to Plaintiffs and have committed the tort of outrage, causing Plaintiffs damages by way of emotional distress and otherwise.

17. Defendants should be punished for their improper actions and made an example to others.

WHEREFORE, premises considered, Plaintiffs and each of them pray for judgment against Defendants and each of them in a sum in excess of $10,000 actual damages, in a sum in excess of $10,000 punitive damages, interest, costs, attorney's fees, and such other and further relief to which they are deemed entitled.

Respectfully submitted,

FRASIER, FRASIER &
HICKMAN

By: /s/ Steven R. Hickman
STEVEN R. HICKMAN,
OBA#4172
1700 Southwest Blvd.
P.O. Box 799
Tulsa, OK 74101-0799
918/584-4724

Exhibit "A"

Richard Abbott
D.L. Abel
C.M. Aingell
Beverly Allen
Alf Anderson
Kenneth Anderson
Perry Anderson
Ronald Anderson
Rex Apker
P. Appelman
Robert Armstrong
Francisco Arreola
Richard Artherton
Donald Austin
Donald Bacon
Robert Baker
Billy Ballard
Theodore Barnes
E.R. Barnett
Otto Barnhouse
John Barros
Robert Bates
James Baty
Kenneth Baysinger
L.V. Bell
Salvatore Bellavia
Jim Bennett
Charles Bentz
James Berkheimer
Francis Berry
Edward Bez
W. Dean Bickford
Jerry Bigpond
Don Bizzell
Everett Blackwell
F.D. Blair
Oakley Blake
Elston Blakesley
Earl Blevins
Roger Blunk
Don Bobino
James Biodien
Malcolm Bongiorno
John Bono
Billy Bradshaw
Eugene Brasiola
Jerry Brewer
Amos Brown
Darrell Brown
Ruby Brown
Riley Bryson
Lawrence Bump
C.L. Burba
William Burke
Alvin Burney
Thomas Burton
Robert Byers
Joseph Cairney
A.W. Caley, Jr.
Billy Campbell
Terrell Cantrell
Harold Carlile
Jack Carner
Leon Carnes
Robert Carr
Robert Carroll
B.J. Carrouth
James Carter

Loretta Carter
Robert Case
Ronald Cash
Donald Cates
Don Caudle
Ronald Chadwell
Charles Chaney
Gwenan Childress
Walter Chomosh
Freddy Christian
Lee Chronister
Jerry Clapp
Bobby Clymer
Darrel Collings
Lee Compton
Christopher Conboy
Dudley Conner
Jackie Cook
James B. Cook
D.E. Cooke
Leigh Cooley
Darrell Cooper
Simon Coscia
Salvatore Cottone
Kenneth Cox
Marion Craig
Jerry Crews
Don Curtis
Gerard Daigneault
Richard Darrah
Larry Davidson
Lyle Davis
John Dean
E.L. Demry
J.J. Dickey
Harry Dietzfeld
Sherman Dillard
W.G. Dobbs
Herschel Dodd
Dennis Dorigan
Elmer Downing
Philip Drummond
Donald Dykes
Paul Eakin
Donald Eaves
Steve Efstathios
Wolfgang Ehrecke
Robert Elias
Marvin Ellis
Lawrence Elmore
Ted Estes
Jimmie Eulitt
Leo Evans
George Farmer
Robert Filak
V.L. Finn
John Fisher
Benny Flemings
Donald Fletcher
Ronald Folsom
Lloyd Frank
Don Freeman
James Fritsche
Ralph Fruechting
Bobby Funderburgh
Robert Funkhouser
Robert Gajarski
Charles Gann
Jack Garland
Leo Garrett
Vernon Garrison
Kenneth Gastineau

H.G. Gaylor
Ralph Gemma
Morgan Geoghegan
W.B. Geoghegan
Edward Glaessgen
Michael Glover
Dale Gollihare
Frank Gonodolfo
James Graham
Robert Graham
Glenn Green
John Greenwood
James Griffith
Johnny Grimes
Clyde Guidice
Roland Guilz
L.E. Guinan
Dale Hagins
John Hair
Jim Hale
Carroll Hamer
J.H. Hancock
C.D. Hanner
Floyd Hansbury
David Hansche
Carl Hansen
Donald Hansen
J.L. Haralson
Henry Hardgrave
Rondal Hargett
Elgin Harp
Patrick Harris
Paul Harris
Wayne Harvey
Tyler Hatcher
Richard Hatley
James Hay
Bernard Headley
Walter Hellmich
Gail Helms
Clyde Henager
Michael Henry
Darrel Hensiek
Gene Hepola
Richard Hibbard
Paul Hilburn
Roy Hilburn
Don Hobbs
Harry Holmes
John Hoops
Harold Hopp
Harry Houdek
Michael Howe
Benny Howell
Gerald Hughes
Lawrence Hughes
Harvey Humes
Kenneth Hussey
R.G. Hutchings
Milford Hutton
Nicholas Ignatovich
Bill Ingram
Jimmie Isom
James Jackson
William Jackson
Gary James
Phil James
Allan Jannelli
C.W. Jernigan
David Jiran
Edwin Johnson
Joseph Johnson

Dale Jones
Donald Jones
Gerald Jones
Johnnie Jones
Leroy Jones
Carroll Joplin
W.A. Joslin
Earl Judd
John Kaiser
George Karahalis
John Kashishian
Philip Kelly
William Kelly
Clarence Keys
Jerry Keys
John Kimbrough
Henry King
Charlie Kinsey
Morgan Knapp
Don Koehn
John Koehn
Chester Koskey
Robert Ladd
John Lambe
Wayne Lancaster
Homer Latta
Jimmie Lawhorn
Earl Le Melle
Don LeMaster
Darrell Leak
Vernon Lehr
Claud Lenard
George Lerner
Michael Lewis
Maurice Lilley
Danny Lincicome
Delbert Lindsay
James Locut
Ernest Loening
Frederick Lohnau
David Long
M.L. Long
Bruce Longwell
Richard Loranz
Vaughn Loyd
Martin Lynch
Richard Lynch
John Mack
Jon Madish
James Maggio
James Mangold
R.N. Maples
Richard Marquardt
Edward Marraccini
Jerry Marshall
Clifford Martin
Darrell Martin
Ronald Martin
Bill Massey
Karl May
Harold McClain
Bertran McClellan
Jerome McColley
Kenneth McCreedy
Jerome McDonough
J.V. McGahan
Jerry McHenry
Jasper McIntosh
Arthur McMillen
David Melone
John Merena
Kenneth Metzinger

Arthur Michaelis
John Miller
Salvatore Milone
Jesse Milton
Jimmy Minson
Roger Monyhan
Jim Moore
John Moore
George Morris
Marvin Morris
Harold Morton
John Moscovits
George Moseley
Curtis Moyer
Reece Murray
Frank Negrotti
Charles Nevins
E.D. Newcomb
A.E. O'Connor
Charles O'Dell
Eugene O'Sullivan
Jesse Ojeda
Frank Oxford
Billy Parker
Charles Patton
Dale Pauley
J.D. Payne
Jarry Payton
Jessie Peel
John Perez
Jose Perez
Charles Perry
John Pezzella
Jerry Phillipo
Robert Phillips
Alfred Pirkheim
August Polonio
Robert Polson
Kenneth Polston
Francis Porrello
Billy Porter
William Poteete
Terry Potter
Thomas Potter
Alan Powers
C.L. Pratt
Wayne Pratt
Fred Prickett
William Pugliese
Richard Quint
Doy Raines
Glen Rainwater
Lester Ransom
Donnie Reeves
Robert Resch
C.L. Reynolds
Wendell Reynolds
James Rigsby
Thomas Rikkola
Maurice Rioux
George Risley
Michael Rizzuto
Guy Roberts
W.E. Roberts
Jim Roddy
Richard Rogers
Lee Roles
Gerard Rosato
Rex Roush
Robert Rowland
Carl Rupe
Leonard Russo

Santos Sabala
Joseph Salamon
Gary Samples
Andrew Sapp
Joseph Schaffer
Thomas Schietzelt
Robert Schirmer
Wayne Schneider
Albert Schultze
Siegfried Schweigert
Francis Seely
Albert Sells
William Senia
C.D. Shanklin
J.L. Shannon
D.E. Sheets
Sam Shell
Ronald Shelley
John Shipley
Donnie Shipman
Carl Shortman
John Simonetti
Walter Simpson
Larry Sitler
Lloyd Skinner
Ned Skipper
Joseph Sklenar
Clayton Smith
David Smith
Gary Smith
Paul Smith
Cecil Smock
Vincent Sodano
Alan Sorensen
Joseph Stammer
John Staub
Bobby Steele
James Stephens
Martin Stephens
Ronald Stiles
Lawrence Strope
Darrel Stroud
Bob Sullivan
David Summers
Donald Summers
William Sutton
Philip Swanson
Bobby Theilen
Calvin Thomas
Herschel Thompson
James Thrasher
Earl Tillery
Louis Tims
Robert Tinker
Richard Tinkler
Leon Trammell
Hobart Troglin
Jacob Trujillo
Ralph Tuccillo
Esper Tucker
Joe Tucker
Terry Tucker
Paul Turner
Vincent Tuzzolino
Delbert Tygart
Jack Underwood
Wilbur Vancil
Arnold Vanderpool
Brazel Varela
Thomas Varley
H.L. Vermillion
Richard Vesneske

Roy Vogt
Prentiss Wade
Kenneth Wakefield
Garland Walker
Milbon Walls
Johnnie Walton
L.L. Ware
Leon Warner
James Watson
Jerry Wayman
Gordon Weesner
James Welch
Uylus Welch
Percy West
W.E. Westerman
Charles Westmoreland
A.R. Weston
William Wetzel
Glenn Wheeler
Chester White
Vernon White
Jim Whiten
Jim Whittle
Frank Wiesmann
John Wilken
T.R. Williams
W.K. Williams
Robert Wilson
W.A. Wilson
Donald Wiseman
Danah Woods
Edward Wright
George Wurmb
Bill Yarbrough
Pressley Yarger
Robert Yock
Cindy Young
Geo. J. Young
James Young
Dennis Zegar
Virgil Zielke
Robert Zinck

APPENDIX E

[Filed Aug. 19, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 99-CV-269-H

EARL TILLERY and 469 others, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

TRANSAMERICA ASSURANCE COMPANY, a foreign insurance corporation, and FUTURE PLANNING ASSOCIATES, a corporation,
Defendants.

[EXCERPTS FROM]
REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON AUGUST 13, 1999

HEARING ON MOTION TO REMAND

* * * *

[2] PROCEEDINGS

August 13, 1999

THE COURT: Please be seated. The Court calls the case of Tillery vs. Transamerica Assurance Company. Could counsel please identify themselves for the record.

MR. HICKMAN: Steve Hickman for the plaintiff.

MR. GOURASH: Daniel Gourash for defendant Transamerica.

MR. BROWN: Jack Brown for defendant Transamerica.

MR. LINSCOTT: Michael Linscott for defendant Future Planning Associates.

THE COURT: All right. This matter comes on pursuant to a motion to remand. Mr. Hickman, you are recognized, sir, in support of your motion.

* * * *

[11] THE COURT: And at the point of removal you provided me with removal papers and a petition that you believe demonstrate the existence of a federal question. Right?

MR. GOURASH: And a statement that it was preempted by ERISA.

THE COURT: Well, I mean—

MR. GOURASH: In my removal papers.

THE COURT: Right. Right. No, I'm not saying you didn't assert, adequately assert. But my point is when the federal court is asked to assume jurisdiction, whether diversity jurisdiction or federal question jurisdiction through the removal process, the obligation is on the defendant to prove that this Court has jurisdiction. In support of that it directs the Court and provides the Court with its notice of [12] removal matters that would demonstrate that jurisdiction resides here. Right? That's the job at the point of removal. Right?

MR. GOURASH: Right.

THE COURT: Now at the point of removal there is, for example, in diversity jurisdiction all manner of exhaustive jurisprudence about whether people have met the jurisdictional amount, whether that notice of removal and the petition adequately sets forth an amount. Right? We

had that conversation in connection with this case because the removal papers, coupled with the petition, one looks to see whether or not that makes clear that there was diverstiy jurisdiction. This Court found there was not on that set of papers. So then the question becomes you have identified further in your notice of removal a claim that this is federal question jurisdiction as well, and that's the issue that we're focusing on now. The threshold question is what does this Court look to for purposes of making that determination not specific facts but rather what sources of factual information are legitimate areas of inquiry for this Court.

MR. GOURASH: My understanding is the petition.

THE COURT: Right.

MR. GOURASH: And the law

THE COURT:All right. Then let me ask you this. Where in his petition does he say that this is an ERISA plan?

[13] MR. GOURASH: He doesn't. The point is—

THE COURT: I'm looking right where you told me to look.

MR. GOURASH: Yeah, but you don't know need to. What you look is the nature of the claim. And if you look at paragraph—

THE COURT: How do we know this isn't a Woodworker's claim based on the petition.

MR. GOURASH: I don't think you need to put that in your papers if it isn't Woodworker's.

THE COURT: Well, you're saying that you know what it is and that I should know what it is by reading the petition.

MR. GOURASH: No.

THE COURT: Right?

MR. GOURASH: You look to see—for purposes of complete preemption. I don't believe Woodworker's comes into that analysis yet. I think it comes into play

rather in the Butero analysis where you've got to go through a four stage analysis to see whether this is an area of the law for these benefits that is to be completely preempted by ERISA. And I would point to Paragraph 14 which is the only paragraph where there's a request for relief where it says "as a result of the fraudulent or negligent acts of defendants the plaintiffs have suffered damages in the form of increased rates." Now what are rates? Rates are what benefits you receive for a certain [14] amount of money. And under the preemption analysis when you apply that, when you look at the nature of that claim, that is a type of claim that is an 1132(a) claim.

THE COURT: Perhaps. How do we know that this isn't a Woodworker's claim?

MR. GOURASH: Well, based upon the petition that we have.

THE COURT: Right. I'm just looking at Paragraph 14. How do we know that this isn't a Woodworker's claim. For example, if Woodworker's—let me ask you the following question. Would Woodworker's foreclose preemption under the following facts—which certainly are not in the petition because there's hardly anything in the pettion. But under the following facts, hypothetically, if an insurer goes to a union and says we want to offer a plan. And the union representative says well, try to sell it to the members. And they are going to select you or one or the other or the other options. And all three people make presentations to the members and the members vote, based on those representations, to select one or the other or the other, and then when it turns out when they get the plan, it didn't provide what the representations were. Is that a Woodworker's case?

MR. GOURASH: Under your set of facts.

THE COURT: Right.

* * * *

[15] THE COURT: Well, I'm—tell me this. How do I know? You've told me that I'm supposed to look at the petition [16] and I've invested six readings of it so that's taken all of seven and a half minutes. Now you tell me that's my source.

MR. GOURASH: Okay.

THE COURT: So I've looked over this thing and I'm trying to find how I know that that's not this case.

MR. GOURASH: Well, what he doesn't plead—what he does plead is in Paragraph 7 and—

THE COURT: But wait, wait. Can you start with what you told me was my source of—

MR. GOURASH: Yeah, the petition.

THE COURT: The petition. All right, go ahead.

MR. GOURASH: Paragraphs 7 and 9 talks about in 1995 Future Planning Associates goes out to the workers.

THE COURT: Right.

MR. GOURASH: Okay, what he omits and what I don't have a chance to bring up anywhere is that at that moment and prior to that moment, that plan is in place. But I can't plead his facts for him. I've got 30 days under the removal statute to do something.

THE COURT: Right.

MR. GOURASH: And there's no mechanism for me to plead new facts for him and I don't believe there's a requirement to plead against every potential defense to a remand motion in my notice to remove.

THE COURT: But the fundamental principle of removal [17] is that you're able to demonstrate on the petition and your removal papers that jurisdiction resides here. Right?

MR. GOURASH: And I believe I've done what's required, Your Honor.

THE COURT: Well, but I'm asking you this. And I know it sounds like it's of a refrain but if the only thing that is before the Court is this petition and it is

possible to construe this petition as a Woodworker's claim —because my hypothetical could exist in this petition. Right? Then how do I know that this is really that matter which is subject to preemption based on what I have before me and you have told me that I'm supposed to look at versus the alternative?

MR. GOURASH: That's the purpose for a motion for remand that's brought up at that moment.

THE COURT: It's not brought up at that moment. The purpose of a motion for remand is to say to the federal court at the point of removal you didn't have jurisdiction, not at this point you don't have jurisdiction. There is nothing that permits a federal court to take on board subsequent information after the point of removal because the issue time point of focus for purposes of removal is did you have jurisdiction at the moment of removal based on the petition and the removal papers and, particularly in federal question circumstances, other matters in the record at that time which might have been probative in connection with this issue. Right? I mean you [18] would agree that you don't remove and then later say, oh, by the way here's some other stuff that brings about your federal jurisdiction. For example, you cannot, you would agree you cannot come in after the point of removal and subsequently claim that the jurisdictional amount exists in a diversity context if you didn't make that clear at the point of removal. Right?

MR. GOURASH: I would agree.

THE COURT: All right. So that's the jurisprudence of removal. And in fact, the federal court sua sponte, although rarely exercised, sua sponte has an obligation to review removal petitions by itself. And this Court routinely does that, which is a matter of some consternation to the defense bar.

MR. GOURASH: I've read a couple of your opinions. I would submit, Your Honor—

THE COURT: Some have gone back to members of your firm.

MR. GOURASH: You know, this case was originally filed on March 18th. Woodworker's was filed itself March 10, nine days before . And, you know, to the extent I had to distinguish a case that hadn't quite made it on to the system yet, I—

THE COURT: I'm not talking about deficiencies that you performed as an attorney under applicable law, I'm just talking about what the Tenth Circuit has sought to amplify.

[19] MR. GOURASH: But if you are saying I should have pled around Woodworker's, that was filed nine days before the petition, with facts that would have gotten me outside of Woodworker's, I don't know what to tell you.

* * * *

[26] THE COURT: Where does it say? I'm just saying what he—I mean it's not clear to be that he isn't presenting himself under the hypothetical scenario that I identified, which is this was presented to him as a purchaser as contemplated by—

MR. GOURASH: And not by the insurance company. Further Planning Associates, not by the insurance company. There's no reference in here thatt he insurance company ever said anything to any of these members.

THE COURT: Well, it claims that they were agents for the insurance company.

MR. GOURASH: That's not—that's not what it is. The point is—

THE COURT: You told me to look at the petition.

MR. GOURASH: —prior to that point in time—

THE COURT: Right.

MR. GOURASH: —that plan was in effect.

THE COURT: But it says they are agents for them.

MR. GOURASH: It says they are agents.

THE COURT: And you told me to look at the petition, so I'm looking.

MR. GOURASH: I would like you to look at my briefs, too.

[27] THE COURT: No, I did look at your briefs. And all I'm saying, I keep coming back to the point of what forms the factual basis for making this decision. And you've made a representation about how the application, that the test of Butero should—how that should be made. So I'm going back to the petition that you told me I should look at and I'm trying to see what's being said there. But it doesn't seem to be being said, there's a slight disconnect in the brief and the petition. For one thing the brief exceeds two pages, so necessarily its going to exceed the claims in the petition, as sparse as they are.

Now the question—what really seems to me begs the question is what are you supposed to do when you get something which is—applies and certainly triggers analysis under the artful pleading doctrine, and to what extent can the Court respond to artful pleading that is a preempted, potentially preempted case that they undertake to artfully plead around? And I think that the answer to that, at least in the treatises that we have reviewed in that respect, is before getting to the trigger point of removal is to make sure that you've got a record that demonstrates that this is only artful pleading and that the hypothetical that could happily reside here doesn't exist. That there's a plan in being, that this is merely a claim under that plan. But I don't know that that's what this says. This says that the defendant was acting as an agent for [28] Transamerica, that they made representations—that they presented the plan to these members, they made representations in connection with that presentation, they made purchases as a result, and that they were fraudulently induced to do so. In other words, it invokes the

language of Woodworker's throughout. Now is that artful pleading in this case? I don't know. I'm not even clear what I'm supposed to—how I'm supposed to know that based on the record as it existed at the time of removal. Anyhow what's the remainder of the—

* * * *

[33] MR. LINSCOTT: I don't have a copy of the actual petition in front of me, but I would like to refer the Court to our combined reply. And maybe the Court has addressed this, so the only ting I feel I need to add to what's been said, and that is that in Paragraph 7 the plaintiffs called this pan the TWU Optional Term Life Insurance Plan. I mean that's what they refer to it as. And with that it seems pretty clear in their pleading that it was an accepted TWU plan that was then provided to them—

THE COURT: But how was it accepted?

MR. LINSCOTT: Well, I don't know that that inquiry is—I mean, that's not stated in the petition, how it was [34] accepted.

THE COURT: Right.

MR. LINSCOTT: It is in later in materials that were supplied to the court, but I mean for purposes of the removal.

THE COURT: Right. No, no, that's what I'm saying. I'm not saying they say in the petition.

MR. LINSCOTT: Right.

THE COURT: I'm asking as a factual matter how was it accepted? Do we know?

MR. LINSCOTT: I see where you're going, but I was thinking at this point they are saying it was accepted.

THE COURT: Do you agree with Mr. Gourash that at least the hypothetical is that if that acceptance was gained, hypothetically, by the union saying we don't make these decisions, our members make these decisions. You

guys make your presentation to them. And A, B and C make a presentation and A's is chosen by those members, but it happens to be chosen because A made fraudulent representations, would you agree that's a Woodworker's case?

MR. LINSCOTT: I wouldn't in the strictest sense, but I would say this, that I think—

THE COURT: Why not?

MR. LINSCOTT: The reason because I think—

THE COURT: Would you say it in the loosest sense?

MR. LINSCOTT: In that, in the case that you just [35] mentioned there wouldn't be a plan yet. Because if the TWU had said, yeah, we would be interested in it, but go get the membership to approve it, then I think we would be sitting there in a situation where we wouldn't have a plan in place and therefore none of the ERISA aspects could apply. But here we do.

THE COURT: But the cause of action wouldn't arise, I'm saying in that hypothetical situation that's how the purchase was made. They select the Option A. The representative from Option A made fraudulent statements in order to gain the votes of the members to select Option A. They later, one of the people who voted for the plan goes in to gain benefits and finds out that it's not what they said it was going to be.

MR. LINSCOTT: Okay.

THE COURT: Is that a Woodworker's case?

MR. LINSCOTT: I'll have to say I'm confused now. What I'm looking at though is whether or not there was a plan in place before the membership was offered to participate. And in your hypothetical, the first one, I understood it to be that there wasn't any agreement for the plan but if you can get them to sign up then, yes, there will be a plan.

THE COURT: Right. No, that's the hypothetical. As long as it's hypothetical it's not this case.

MR. LINSCOTT: Right.

[36] THE COURT: My only question then becomes is if that hypothetical is a Woodworker's case?

MR. LINSCOTT: Okay.

THE COURT: Is it? Mr. Gourash says it is.

MR. LINSCOTT: Again, I'm looking at Woodworker's from the standpoint of you have the insurer going to the employer directly and that the employer then sues saying we didn't get what you promised.

THE COURT: Well, it says here that the insurer did go to the employer directly.

MR. LINSCOTT: Exactly. Well in—

THE COURT: Through his agent.

MR. LINSCOTT: In Woodworker's?

THE COURT: No, here in the petition.

MR. LINSCOTT: Oh, here. Okay. Well, I know that's the allegation in there and that is what we have to work with. But again it went to the union. You know, to the union. I know they're saying it went to the membership. But the fact that the petition called this plan that they brought them the TWU plan, it means it was the TWU's plan. In other words, there was a plan in place before it went to them, and at that point it becomes the administration of the plan.

THE COURT: And for purposes—leaving the hypothetical aside—well, let me ask you the first question about the hypothetical. On this petition, can this [37] hypothetical live in this petition? Is there something that means that it's not a Woodworker's case because I can read the petition and clearly they can't lay claim to Woodworker's because it's not here? They have said something in their petition that triggers a non-Woodworker's hypothetical. Can my hypothetical live in this petition?

* * * *

THE COURT: I'm not trying to doubt what they know. I'm trying to figure out what I'm supposed to know. And I've been told, do you agree, I'm supposed to just look at this petition?

[38] MR. LINSCOTT: Well, we have submitted some other materials relevant to it.

THE COURT: Post removal?

MR. LINSCOTT: Right. And not things that occurred post removal.

THE COURT: How probative is post removal factual submissions for purposes of jurisdictional questions.

MR. LINSCOTT: Going back to enlighten the terms of the evidence as pled, we think it could be considered. I know what you're saying. I've read the cases where it says look at what the petition is and so forth. And that's why, and I'm not trying to beat a dead horse myself here, but when they believe that what the name of it is, whether they say it's referred to or what, that's clearly telling us that it's the union plan. And if the union plan is in place, then this is ERISA. And that's the gist of what our argument is. I recognize they say reference or presented or whatever. I don't know that the word "presented" is so off the mark, because as Mr. Gourash properly pointed out, there was a bidding process and the union selected this plan and then it was offered to the members. And I think you can glean that from the petition. I'm saying—

THE COURT: So I've got to decide that this is a union plan because it's referred to as that?

MR. LINSCOTT: I think that gives you the basis to do that.

[39] THE COURT: So if I refer something to as the Bank of Oklahoma, that's Oklahoma's bank?

MR. LINSCOTT: Well, from the standpoint of the pleading it's just as some of the other language in the pleading—

THE COURT: I'm just reading. Right?

MR. LINSCOTT: Well, I think it would go against common sense to think he just pulled TWU out of the air. I mean, you know, the TWU Optional Term Life Insurance Plan. I think even they admit—

THE COURT: They pulled Oklahoma out of the air in Bank of Oklahoma. Right?

MR. LINSCOTT: Right. I don't know how to respond to that.

THE COURT: I mean the problem is—look, I'm very sympathetic to the problems occasioned by the 30-day time trigger and I'm very sympathetic to the concerns about how do you address artful pleading problems. They present themselves clearly in questions of diversity jurisdiction and they present themselves in some narrow areas such as this in areas of federal question jurisdiction. But the law is what the law is, and that is that the Court is required to (1) place the burden on the defendant to demonstrate absolutely that jurisdiction resides here, and (2) to come forward at the point of removal with a sufficient basis in the notice papers and in the [40] petition that would establish the necessary elements for jurisdiction. Now there is a split in the circuits and a split in the various courts about how much latitude defendants are going to have in that situation for the purpose of bulking up the record. But clearly in a context such as this, if the record can demonstrate unequivocally at the point of removal those various provisions that you now have identified and want inferences to be made, one of which is that I'm now being asked to say that Transamerica—that FPA wasn't an agent for Transamerica based on Mr. Gourash's say so, which I weight and credit and I don't have any reason to doubt is true. Sadly, I'm not permitted to take his say so at this point.

Similarly, if you tell me that this thing is referred to as TWU Optional Term Plan, you want on your say so to say that means something about this was the union plan. But even if that were the case—and I don't dispute or have reason to doubt that, even if that were the case, nevertheless facts may exist or may not exist where the union said to its members you guys decide, and we'll approve whichever one you guys vote for. Well, what are they going to make that decision on? The presentations. That would still be Woodworker's, even if they met with the various representatives, hypothetically fraudulent representations were made, they vote and the union says we'll do whatever you guys vote on. At that point the union is acting solely as an agent for these members to whom these [41] representations were made. Again a Woodworker's case.

MR. LINSCOTT: Right.

THE COURT: Now as long as Woodworker's can live in this petition and the record at point of removal does nothing to suggest that this isn't a Woodworker's case. And I understand the arguments and the very well articulate briefs, but I think that counsel, all counsel, has to concede for the defendants that some of the facts that they are basing their arguments on don't exist in the record at the point of removal. They are things you either know or believe or you're sure is obvious to any plain reading of the petition. But I must say that if you were strictly held, as Mr. Gourash tells us we are, to the petition, or to that which is in the record, I've read the petition a number of times. Every time I read Woodworker's, every time I read the cases dealing with removal I reread the petition. And it doesn't get there. And I understand that the difficulties that that will occasion for purposes of—in light of the 30-day triggers and I've certainly already thought through the parade of

terribles which may exist, because when this case goes back, and it is, and you develop sufficient facts that you believe demonstrates that there's a federal question, and it's clearly so, and undertake to bring it back here, I have a hunch, based on this colloquy that the first line of defense is they all knew that long before the point of removal and 30 days expired long after. [42] Just a hunch based on, in part, Mr. Gourash's very powerful oral argument here. I don't disagree that that occasions some real problems, but that's the next turn of the wheel. But for purposes of this turn of the wheel, jurisprudence on removal is very clear of what the Court is to look at. Based on what the Court is looking at it cannot be said that this is clearly a matter of complete preemption because all counsel concede that a Woodworker's claim can live in this petition. And if that's what I'm looking to, and it could well be, without knowing, that kind of a state claim for fraudulent inducement, then I can't make sweeping conclusions about what's really in this plan or not in this plan or who was an agent of whom or any of those. I just look at what's before me, and on that basis the defendants have not demonstrated and met the burden of establishing jurisdiction in this court. Accordingly, the motion for remand will be granted. We will have an order out forthwith to that effect.

All right. Anything further, Mr. Linscott, in this regard?

MR. LINSCOTT: No, other than I just want it noted that we didn't really agree with the concept that Woodworker's would be incorporated in this petition.

THE COURT: No, no, it's not you're saying that this is a Woodworker's claim, and I'm not trying to suggest for the record that you agree with that. The only question was could a [43] hypothetical Woodworker's claim exist in this petition? Is there something in this petition

that makes it clear that it is not a Woodworker's claim, and on the face of the petition. That has nothing to do with the lawsuit as it goes forward and the actual facts and the ultimate claims. But on just this petition, the fact that a Woodworker's claim could exist in it, that may mean that it's a state claim. It would be wrong for this Court to assume jurisdiction without it having been established that it was the federal claim. All right.

* * * *

[45] THE COURT: All right. Does that take care of your concern, Mr. Gourash, to put on record a request that it be made in the form of an appealable order?

MR. GOURASH: Yes.

THE COURT: Does that take care of it?

All right, anything further on behalf of the plaintiffs, Mr. Hickman, sir?

MR. HICKMAN: No, Your Honor.

THE COURT: Mr. Gourash, anything if you are, sir?

MR. GOURASH: No, Your Honor.

THE COURT: Mr. Linscott, anything further, sir?

MR. LINSCOT: No, Your Honor.

THE COURT: Mr. Brown, anything further?

MR. BROWN: No, Your Honor.

THE COURT: All right We will be adjourned.

(Recess).

APPENDIX F

[Filed Aug. 17, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 99 CV 0269H (M)
JUDGE SVEN HOLMES

EARL TILLERY and 469 others, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

TRANSAMERICA ASSURANCE COMPANY, a foreign insurance corporation, and FUTURE PLANNING ASSOCIATES, INC., a corporation,
Defendants.

TRANSAMERICA ASSURANCE CORPORATION'S MOTION FOR LEAVE TO AMEND NOTICE OF REMOVAL OR, IN THE ALTERNATIVE, REQUEST THAT ANY REMAND ORDER CLARIFY THAT IT IS NOT A § 1447(c) ORDER

Defendant Transamerica Assurance Company ("TAC") respectfully moves this Court for an Order granting it leave to amend its Notice of Removal to cure the defects in its jurisdictional allegations as perceived by this Court. In support of this Motion, TAC incorporates the reasons, facts, arguments set forth in its Memorandum in Support filed herewith and its proposed Amended Notice of Removal attached hereto. In the alternative, TAC respec-

tively moves and requests that any remand order issued by the Court clarify that it is not based on § 1447(c), lack of subject matter jurisdiction or, in the alternative, that the Court clarify its Order and the Order denying this Motion to Amend pursuant to 28 USC § 1292(b).

Counsel for TAC has conferred with Plaintiff's counsel who objects to the Motion.

Respectfully submitted,

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 99 CV 0269H (M)
JUDGE SVEN HOLMES

EARL TILLERY and 469 others, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

TRANSAMERICA ASSURANCE COMPANY, a foreign insurance corporation, and FUTURE PLANNING ASSOCIATES, INC., a corporation,
Defendants.

AMENDED NOTICE OF REMOVAL

Defendant Transamerica Assurance Company ("TAC") hereby files its Amended Notice of Removal of the above captioned action to the United States District Court for the Northern District of Oklahoma from the District Court of Tulsa County and for its Notice of Removal states:

1. On March 19, 1999, plaintiff Earl Tillery commenced an action in the District Court of Tulsa County, Oklahoma, styled: *Earl Tillery, et al v. Transamerica Assurance Company, et al.*, Case No. CJ 99 1311. On March 25, 1999, the Complaint in that action was served upon the Insurance Commissioner of Oklahoma as designated agent for service of process of foreign insurance

companies doing business in the State of Oklahoma under U.S. 36, Section 621B, a true copy of which is attached hereto in *Exhibit A*, as provided by 28 U.S.C. § 1446(a). Defendant Future Planning Associates ("FPA") was served with a copy of said Complaint on March 30, 1999. No defendant received any copy of the Summons, Complaint, or any other document from which it could be determined that this case could be removed at any time prior to March 25, 1999. All defendants joined in the notice of removal.

2. The value of the matter in controversy in this case exceeds $75,000.00, exclusive of interest and costs in that Plaintiff seeks to secure life insurance death benefits in excess of such amount. *See e.g.*, Letter of November 1, 1998 at p. 3 attached as Exhibit E to the Memorandum In Support of Defendant's Motion to Dismiss Complaint or In the Alternative Motion To Strike Demand For Jury Trial and Claim for Punitive Damages, which is attached hereto as *Exhibit B* (establishing that death benefits available may exceed $200,000.00).

3. Transamerica Assurance Company is a Missouri corporation, with its principal place of business located in Los Angeles, California.

4. FPA is a New York corporation, with its principal place of business located in New York.

5. Plaintiff who is the only named Plaintiff in this action and seeks to represent a class, *see* Hearing Transcript attached as *Exhibit C*, is a resident and citizen of the State of Oklahoma and no defendant is a citizen or resident of Oklahoma. The defendants, therefore, are of complete diversity of citizenship from plaintiff.

6. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1), which provides that

district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between citizens of different states. The entire action may therefore be removed pursuant to 28 U.S.C. § 1446(b).

7. In addition, this Court has federal question and subject matter jurisdiction over this action pursuant to 29 U.S.C. §§ 1001, *et seq.* (ERISA), in that plaintiff's claims "relate to" an employee benefit plan. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). In support of this allegation, TAC states:

a. The TAC Policies at issue in this case are part of an ERISA plan and contain an ERISA Notice. The were negotiated and endorsed by the Air Transport Division—Transportation Workers of America (the "Union"), which is an employee organization under the statue and applicable regulations. *See* Group Master Policy No. 05808011 and Group Master Policy No. 0848100 attached in *Exhibit B*; *see also* various letters attached in *Exhibit B* and to the Affidavit of John Pescitelli attached as *Exhibit D* (these documents established that the Union negotiated and endorsed the plan).

b. Further, the policy or plan was in place and agreed to by TAC and the Union before it was offered to Plaintiff or other members. Thus, it was in place at the time of any alleged misrepresentations in Plaintiff's Petition. *See* Pescitelli Affidavit; *see also* Plaintiff's Petition. Indeed, Plaintiff has admitted this fact. *See* Plaintiff's Supplemental Memborandum at p. 3 attached as *Exhibit E*.

c. Plaintiff's claims in this case are for alleged misrepresentations made post-plan. Moreover, as set forth in the Petition, Plaintiff seeks continued death benefits as allegedly represented. Thus, Plaintiff's claims depend on and affect the administration of the plan and the relevant benefits.

d. Plaintiff is a member or participant and not the policyholder, as was the case in *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F. 3d 985 (10th Cir. 1999). Thus, because Plaintiff's claims are for post-plan representations and are brought by a member seeking benefits, *Woodworker's* is distinguishable and Plaintiff's claims are completely preempted by ERISA.

8. Defendants' original Notice of Removal was filed within thirty (30) days after the date the Complaint was received by TAC and FPA. Therefore, the Notice of Removal was timely filed in accordance with 28 U.S.C. § 1446(b).

9. Written notice of the filing of the Notice of Removal was given to all parties, together with a copy of the Notice of Removal. A Notice of Filing of Notice of Removal also was promptly filed with the Clerk of Courts of the District Court of Tulsa County, Tulsa, Oklahoma.

10. There is filed herewith, and by reference made a part hereof, a true and correct copy of all process, pleadings, and orders served upon TAC and FPA in this action, as provided by 28 U.S.C. § 1446(a). (*See Exhibit A*).

Wherefore, defendants Transamerica Assurance Company and Future Planning Associates, Inc. pray that this Court enter this cause on its docket and entertain such

further proceedings herein as may be proper and authorized by law.

Respectfully submitted,

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[Certificate of Service Omitted in Printing]

(2)

No. 99-1196

IN THE

Supreme Court of the United States

TRANSAMERICA ASSURANCE COMPANY, *et al.*,

Petitioners,

v.

EARL TILLERY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondents brought this case in state court against Petitioners for fraud in inducing Respondents to purchase insurance under a policy issued by Petitioners. Petitioners removed the action to federal court, claiming that federal jurisdiction existed because of diversity of citizenship/ amount in controversy and because this was an ERISA claim. Respondents moved to remand, arguing that there was not diversity of citizenship, the requisite amount in controversy had not been met, and that this was not a claim under ERISA. The ruling in favor of Respondents on the diversity of citizenship/amount in controversy jurisdictional issue is not contested here. Rather, Petitioners contest the lack of federal jurisdiction under ERISA.

In the courts below, Respondents maintained two positions relative to whether this action was governed by ERISA or not. First, Respondents contended that the insurance policy herein was not governed by ERISA. *See Zavora v. Paul Revere Life Insurance Company*, 145 F.3d 1118 (9th Cir. 1998), holding that insurance is outside the purview of ERISA where the employer makes no contributions, participation by employees is voluntary, the sole function of the employer is to collect and remit premiums, and the employer is not paid for sponsoring the program. All of these conditions were met in this case. Further, the insurance herein is even farther removed from ERISA because, although the union had some dealings with Petitioners to set up the insurance, it was not in any way a matter of collective bargaining with the company, as in the case of union-sponsored retirement or health plans where the collective bargaining agreements require the company to pay all or part of the costs for employees.

Second, even if the insurance were subject to ERISA, the claims brought herein are not brought under ERISA. The relevant cases here are *Woodworker's Supply, Inc. v. Principal Mutual Life Insurance*, 170 F.3d 985 (10th Cir. 1999), which holds that fraud in the inducement claims are not subject to ERISA, and *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332 (5th Cir. 1999), which distinguishes between claims that are completely preempted, giving federal court jurisdiction, and claims which are conflict-preempted, which does not give rise to federal jurisdiction. Complete preemption applies only where the claim is brought under ERISA; where the claim is of a type not within the purview of ERISA, only conflict preemption can apply.

The district court granted the motion to remand on the grounds that plaintiffs have some control over what they are suing for and that the claim herein is not brought under ERISA. *See* Petition for a Writ of Certiorari, Appendix B, p. 10a. The district court ruled that this action is not an ERISA claim and jurisdiction does not exist in the federal court.

The Tenth Circuit, on appeal, considered well-established law to the effect that orders of remand are generally not appealable, unless the order of remand was not made in good faith. 28 U.S.C. § 1447(d). The Tenth Circuit considered that the order of remand was in good faith and that it, therefore, lacked jurisdiction over the appeals.

REASONS FOR DENYING THE WRIT

THE TENTH CIRCUIT OPINION IS WELL-GROUNDED IN LAW

28 U.S.C.§ 1447(d) states in pertinent part:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to § 1443 of this title [dealing with civil rights cases] shall be reviewable by appeal or otherwise.

This seems fairly clear. The district court has remanded the case to state court; the Court of Appeals found no evidence that that order was made in bad faith; the Tenth Circuit properly ruled that it lacked jurisdiction in this matter.

There are two problems with Petitioners' arguments about wanting to amend their Notice of Removal. First, their request for amendment came after the district court said at oral argument that it had no jurisdiction. In other words, it came too late. Second, the district court considered that plaintiffs have some control over what it is they are suing for and that Respondents said they were suing for something outside the scope of ERISA. Thus, even though Respondents' claims could ultimately be conflict-preempted by ERISA, the claims themselves were outside the scope of ERISA and, therefore, not preempted so as to grant federal court jurisdiction. No amendment of the removal notice would cure such a defect.

Federal courts are of limited jurisdiction. If there is some doubt as to whether they have jurisdiction, the appropriate thing is to remand the case to state court. The lower courts have acted properly here. The district court decision is not subject to review.

CONCLUSION

WHEREFORE, Respondents request this Court to deny *certiorari* and allow this matter to proceed forward in state court.

Respectfully submitted,

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